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Nos. 688 - 689

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. .....

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants;
and
M. A. PRICE, JOHN M. RASBERRY and J. R. HUTCHENS, for themselves and as Directors of Oklahomans for Local Government, an unincorporated association; and DON BALDWIN, J. H. BELVIN, ED BERRONG, ROY C. BOECHER, WILFORD E. BOHANNON, ROBERT H. BREEDEN, CHARLES E. COLSTON, RAY FINE, GLEN HAM, LEROY McCLENDON, LOUIS H. RITZHAUPT, ALFRED STEVENSON, TOM TIPPS, BASIL R. WILSON, WALT ALLEN, BOYD COWDEN, BYRON DACUS, CLEM HAMILTON, BOB A. TRENT, JOE BAILEY COBB, LEON B. FIELD, S. S. McCOLGIN, ALLEN G. NICHOLS and GENE STIPE, Members of the Senate of the State of Oklahoma,
Appellants;
VERSUS
HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEANINGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS

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January, 1963.

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OBJECT

This Motion to Dismiss is directed to the Jurisdictional Statement of the Oklahoma Farm Bureau and Lewis H.

Munn, appellants, and likewise to the Jurisdictional Statement of M. A. Price, *et al.* Both arise from the same proceeding before a three-judge court. Both groups of appellants were intervening defendants in that action.

FACTS

A. History of Action

Plaintiff instituted his action in the United States District Court for the Western District of Oklahoma on January 31, 1961. No material action was taken pending the ruling in *Baker* v. *Carr*, decided March 26, 1962.

Thereafter a hearing on April 23, 1962, resulted in a 2-1 decision denying immediate injunctive relief. Those seeking relief did not appeal. Appellants, Price, Rasberry and Hutchens, were allowed to intervene at said hearing and did participate therein. As shown by the opinion of the lower court this relief was denied as a result of their representations. The court said (Appendix xii):

> "A majority of the Court has reluctantly declined immediate interlocutory relief in the form of an injunction forbidding the forthcoming May 1, 1962 primary election, or alternatively, ordering the election to be conducted at large. Our reasons may be summarized as follows:
>
> "Because of the Intervenors' tendered issue of rationality, the drastic and unprecedented relief sought is deemed inappropriate. The effect of such injunctive decree would be to disrupt a long established electoral system on unsettled facts."

Thereafter a pre-trial ensued and the matter again came on for hearing on the merits on June 12. In its June 19 opinion covering the June 12 hearing the court dwelt at some length upon the appellants' offer "to show in retrospect a rational basis for the disparity," which offer caused injunctive relief to be denied at the earlier hearing (Appendix xxix. The appendix in each jurisdictional statement is identical except Price, *et al.*, did not include the last document included in the other.) The court fully explained and justified its failure to grant the appellants any additional time, pointing out that "more than fifty days have elapsed since the denial of temporary relief," that the information requested "is and has been, at all times readily available in the form of public records to the Intervenors, or for that matter, to any interested person," and stated:

> "We are thus brought to the conclusion that if the Intervenors have a defense, based upon the rationality of the present apportionment, they have not diligently pursued it. The continuance is consequently denied." (Appendix xxxii.)

However, ample evidence was offered that did show an invidious discrimination existed, whereupon the court made a finding that the apportionment laws of the State of Oklahoma were invidiously discriminatory, but continued the matter to July 31 for a hearing on the relief to be afforded.

Appellants subsequently thereto filed a Motion to Alter or Amend Decree which was overruled at the July 31 hearing orally and specifically in the August 3 Decree (Appendix xli).

Prior to the lengthy hearing on July 31 and August 1, which culminated in the Decree and the Dissenting Opinion of August 3 all the remainder of the appellants were permitted to intervene over the objections of plaintiff that they would seek to delay the action and change the issues.

All intervenors at the time of intervention accepted the issues as drawn and the record as theretofore made, and agreed to take no action which delayed an orderly disposition of the case on its merits.

At the July 31-August 1 hearings the intervenors were allowed to introduce testimony, purportedly sustaining their contention that the Legislature should and would reapportion itself if given an additional opportunity, and unrelated and unexplained statistics which were represented as sustaining the contention that the census should not be used as a means of apportionment although its use is required by the Oklahoma Constitution, Art. V, § 9(a) and § 10(c). No alternative means of determining fair apportionment was ever proposed by anybody, including appellants.

Thereafter the lower court stayed its hand until March 8, 1963, to allow the Legislature to meet and act. The Legislature convened in regular session on January 8, 1963. However, the Court did outline certain "guide lines or standards" so that the Legislature might be apprised of the court's interpretation of the XIV Amendment as applied to the pertinent provisions of the Oklahoma Constitution.

The three-judge court made clear that the Oklahoma Constitution could be used as a means of apportionment so

long as it did not conflict with the XIV Amendment. Two questions were raised and answered, however, relating to the application of the XIV Amendment to specific provisions.

1. The provision of Art. V, § 10(d), establishing a ceiling of seven on the number of representatives any county might have "violates the XIV Amendment." (Appendix xlii.)

2. The "irreconcilable incongruity" caused by the "except clause" of Art. V, § 9(a), was resolved "in favor of equality of representation, which is mentioned three times in Sections 9(a) and 9(b), believing as we do that it is in consonance with the general principle of the Oklahoma Constitution, as construed by the Oklahoma Supreme Court in Jones v. Freeman, 146 Pac. (2d) 564, and more nearly conforms to the equal protection clause." (Appendix xliii.)

It should be pointed out that the dissenting opinions of Judge Rizley did not oppose the finding of invidious discrimination or the interpretation placed on the Oklahoma Constitution by the majority, but merely asserted that relief should be no longer denied or delayed.

The last paragraph of the August 3 Decree is:

> "Jurisdiction is retained in this case and the same is continued until the 8th day of March, 1963, at which time the case will be called, and if proper action has been taken by the Oklahoma State Legislature under the guidance afforded herein, the same will be affirmed and approved and this case dismissed. Failing this accomplishment this Court will then order and decree

reapportionment by judicial order, in conformity with the guidance herein furnished."

In fact the only substantive order entered by the court below was entered June 19 and is as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Title 14, Secs. 9-77, inclusive, 99 and 100 O. S. (1961), and Article 5, Section 11 of the Oklahoma Constitution, where presently operative, be, and they are hereby declared prospectively null and void, and inoperative for all further elections." (Appendix xxvii.)

***B.* No One Restrained**

Such order does not constitute a restraining order upon appellant State Senators as they allege. They are not named in the order. No judicial penalty will be levied on appellants if they act contrary to the "guidelines" or even if they fail to act at all!

No one sued the legislators in this action. They voluntarily intervened. The only commandment directed to them exists in the Oklahoma Constitution, not the court order. See *Jones* v. *Freeman*, 146 P.2d 564, where the Oklahoma Supreme Court held in 1942 this was their mandatory duty. Parenthetically, twenty years later this duty is still unperformed in spite of that Court saying "the very vitals of democracy" are jeopardized by the legislators' failure to obey their oaths.

Appellants erroneously allege that a special election was enjoined to fill a Senate vacancy. Such an election was held and Senator McComas was elected. He has been seated and is serving in the legislative session in progress.

C. Initiative Will Not Afford Relief

Appellants suggest that the initiative procedure in Oklahoma constitutes relief which should prevent action by the Federal Court. The initiative petition referred to has been submitted to a vote of the people, which said petition had for its purpose stripping the Legislature of the power to reapportion and conferring the same upon an independent board of state wide elective officials. Although approved by a majority of almost 62,000 the Oklahoma Supreme Court declared it failed of passage, No. 40364, December 22, 1962 (December 29, 1962, Oklahoma Bar Journal, page 2547).

Art. V, § 6, of the Oklahoma Constitution provides a similar initiative petition cannot be again proposed within three years by less than 25 per cent of the legal voters, an almost prohibitive requirement within the ninety days allowed for the printing, circulation and filing of a completed initiative petition. Almost fourteen months elapsed from the time the defeated petition was assigned a number by the Secretary of State until the vote thereon. Actually this vote would have been further delayed by appellants, Price, *et al.*, herein had they not considered it to be to their political advantage to force the election at the general election time, November 6, 1962.

The initiative cannot reasonably be considered as relief for four to five more years. At least one or two more years are thereafter necessary, even if it is adopted, before a reapportioned Legislature would be seated. The denial of

Federal Court relief is to deny relief in Oklahoma for five to seven years even if another petition might be approved by the people and not invalidated by the State Court.

***D.* Invidious Discrimination Admitted**

Appellants Price, *et al.*, admit the Oklahoma Legislature:

1. Failed to follow the Oklahoma Constitution (p. 19, Jurisdictional Statement);
2. "Disproportion of population of constituencies under the federal census" exists in Oklahoma (p. 19);
3. Admit the use of the federal census is enjoined upon the Legislature by the Oklahoma Constitution unless another type of enumeration is provided by the Legislature (p. 14).

The three-judge court found material disparities in voting strength of over 26-1 (Appendix xxx). This constitutes at least a *prima facie* case of invidious discrimination as pointed out by the lower court (Appendix xxxi). No evidence or sound argument to the contrary was presented by the appellants!

FACTUAL CONCLUSIONS

No injunctive relief was granted. It is also obvious that this was not a final order. The lower court stated at several hearings that it did not consider its orders either final or appealable. The record makes clear that appellants are uncertain whether an appealable order has been entered. The true nature of the order of the court below was simply to hold as null and void prospectively the existing Oklahoma apportionment laws.

Notice of still another appeal to this Court by appellant has just been received by appellees. It is obvious that at least some, if not all, appellants will seek to appeal again after the three-judge court acts on March 8, 1963, making this a piecemeal appeal. Furthermore, if the Legislature should properly act, this entire proceedings becomes moot.

The lower court has been deliberate and is affording all reasonable opportunities for the state processes to be effective. Appellants were given ample opportunity to present evidence but failed to present any that controverts either the finding of invidious discrimination or the "guidelines" laid down by the court.

PRAYER

WHEREFORE, these appellees respectfully pray that the appeals herein lodged be dismissed for the following reasons:

1. No order has been issued in this cause that is appealable by appellants.
2. No injunctive relief has been granted.
3. Appellants failed to present any evidence to the three-judge court to sustain their contentions that the present apportionments are rational, or that an apportionment in conformity with the Oklahoma Constitution as interpreted by the three-judge court would be irrational and violate the XIV Amendment.
4. Appellants in effect admit the existence of invidious discrimination in Oklahoma.

5. If an appealable order was issued, the June 19 order finding invidious discrimination was not timely appealed.

6. An appeal at this time would cause piecemeal appeals. It will be time enough to review the actions of the court when a remedy has been afforded.

7. The initiative does not afford adequate relief in Oklahoma for redress of the deprivation of constitutional rights of the plaintiff.

Respectfully submitted,

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